IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LAKESHA BRONSON, individually and
by and through her grandmother and
guardian, Georgia Mae Bronson,
BRENDA DOCKERY, and GEORGIA MAE BRONSON, PLAINTIFFS,

VERSUS CIVIL CAUSE NO. 3:93CV101-S-D

EDWARD (SPANKY) MITCHELL, DEFENDANT.

MEMORANDUM OPINION GRANTING MOTION FOR SUMMARY JUDGMENT

This cause is before the court on the motion of the defendant, in his individual capacity, for summary judgment. The plaintiffs have conceded the motion for summary judgment filed by the City of Byhalia, Mississippi, and Officer Mitchell in his official capacity as a policeman for the City of Byhalia. They have been dismissed with prejudice, leaving only Edward Mitchell, in his individual capacity, as a defendant.[1]

[1] On October 12, 1994, the defendant Edward Mitchell died. A suggestion of death upon the record under Rule 25(a)(1) was served on November 3, 1994. The plaintiff did not file a motion to substitute within the 90 days as prescribed by Rule 25(a)(1). The defendant's attorney communicated several times with the attorney for the plaintiff in an attempt to have the motion to substitute filed. On March 17, 1995, the deceased defendant filed a motion to dismiss for failure to substitute. The plaintiffs have request an extension of time in which to file the substitution claiming "excusable neglect."

After an exhaustive review of the record, the court considers the plaintiffs' procedural failure to substitute to be greater than "excusable neglect." But this court prefers to address cases on their merits. Since the court has found summary judgment to be appropriate, the defendant's motion to dismiss for failure to substitute is moot. The estate of Edward Mitchell, deceased, which would have be substituted, could have relied upon the same defenses which Edward Mitchell would have had available. Accordingly, substitution, in light of the court's granting of summary judgment on the merits, would be frivolous.

Summary Judgment Standard

The summary judgment standard is familiar and well settled. Summary judgment is appropriate only if the record reveals that there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(c). The pleadings, depositions, admissions, answers to interrogatories, together with any affidavits, must demonstrate that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Federal Sav. and Loan Ins. V. Kralj, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the nonmoving party. Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). However, summary judgment is mandated after adequate discovery and upon proper motion against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

Facts

About 9:00 p.m. on July 4, 1992, Officer Mitchell was dispatched by the Marshall County Sheriff's Department dispatcher to respond to an unknown lady's complaint that children were shooting fireworks and causing a disturbance in the White Oak Subdivision in Byhalia, Mississippi. Byhalia does not have an ordinance

banning the shooting of fireworks in the city limits, but Officer Mitchell was responding to the call because it was for disturbing the peace. Officer Mitchell drove through the subdivision, using a P.A. system to ask everyone to stop shooting fireworks. As he was turning his patrol car around, Officer Mitchell saw plaintiff Lakesha Bronson popping fireworks in front of the home of her grandmother, plaintiff Georgia Mae Bronson. Officer Mitchell parked his car and walked over to speak Georgia. During their conversation, Lakesha Bronson continued popping firecrackers. When Officer Mitchell returned to his car, some type of fireworks hit his patrol car. Lakesha testified that the fireworks came from the direction of her grandmother's house. Officer Mitchell put his hand around Lakesha's arm above the elbow and told her she was "fixing to go to jail." In her deposition, Lakesha testified that she said: "I ain't going to jail for shooting no firecracker, cause I ain't do it, and I looked at him and I looked at the house, and I said, 'you got to catch me first', and I ran."

Georgia saw Lakesha "snatch[] loose and run" from Officer Mitchell into the house. Plaintiff Brenda Dockery saw Lakesha run into the house, and she heard her say that Officer Mitchell "was trying to arrest her for throwing a firecracker in his vehicle." Officer Mitchell was confronted on the porch steps of the house by Georgia. Georgia stated that Officer Mitchell could not go into her house without a warrant. He told her that he did not need a warrant. Georgia still refused to let him enter her house. After

arguing with Georgia for several minutes, Officer Mitchell called for assistance.

Officer Mitchell and two deputy sheriffs again approached Georgia's house. The two deputies spoke with Georgia in her yard, and Officer Mitchell attempted to enter the house. Brenda Dockery was on the front porch and told him he could not get in without a warrant. Officer Mitchell pulled Brenda's hand from the doorknob and shoved her. He pushed her under her neck and choked her with his right hand. Brenda's back, neck, and legs were strained. Georgia returned to the porch in order to keep Mitchell from entering her house. Officer Mitchell stunned Georgia with his stun-gun on her left side, above the waist and below her shoulder. Officer Mitchell told Georgia that she was under arrest for obstruction of justice.

Marshall County Deputy Sheriff Warren, who had responded to the call for assistance, persuaded Georgia, Brenda, and Lakesha to ride with him to the police station. Brenda was never handcuffed and was released within thirty minutes. Lakesha and Georgia were taken to the sheriff's department where they were booked and then released on bond. In city court, on July 8, 1992, Lakesha was found guilty of disturbing the peace and resisting arrest, and Georgia was convicted of obstruction of justice. No appeal of these convictions was perfected.

Discussion

Lakesha alleges that Officer Mitchell violated her Fourth Amendment rights when he arrested her without probable cause. She

claims that her Fourteenth Amendment rights were violated because she was maliciously prosecuted and found guilty. Georgia claims Officer Mitchell used excessive force in violation of the Fourth Amendment when he used the stun-gun on her, when he attempted to enter her house without a warrant, and when she was arrested without probable cause. Additionally, Georgia claims that her Fourteenth Amendment rights were violated because she was maliciously and illegally tried and convicted. Brenda Dockery claims Officer Mitchell violated her Fourth Amendment rights when he "pushed [her] hand away from the door, threw her up against the door and choked her, causing her to fall back against the door." She alleges that she suffered muscle strain in her back and legs.

From the outset, the court notes that as a matter of law the plaintiffs have not pled sufficient facts to establish a claim associated with a warrantless entry of Georgia's home by Officer Mitchell. Clearly, he attempted to enter her home, but because of the actions of Georgia and Brenda, Officer Mitchell never went into the house. Accordingly, the court finds it unnecessary to discuss whether a warrantless entry of a house upon the exigent circumstances of pursuing a fleeing perpetrator of a misdemeanor is lawful. The plaintiffs' Fourth Amendment claim of warrantless search and seizure is without merit and dismissed with prejudice.

I. Lakesha and Georgia Mae Bronson

The United States Supreme Court held in Heck v. Humphrey, 521 U.S. ___, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), that:

> ... in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other

> harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has **not** been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, ...

Heck, 114 S.Ct. at 2372, 129 L.Ed.2d at 394. In Boyd v. Biggers, 31 F.3d 279 (5th Cir. 1994), the Fifth Circuit affirmed this court's dismissal of a § 1983 claim. The Fifth Circuit held that the plaintiff's claims against defense counsel and law enforcement would effectively challenge the validity of the plaintiff's conviction, and thus were barred.

> [T]he trial court must first ascertain whether a judgment in favor of the plaintiff in the § 1983 action would necessarily imply the invalidity of his conviction or sentence. If it would the prisoner must show that his conviction has been "reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus," in order to state a claim.

Id. 31 F.3d at 283 (quoting Heck, at ___, 114 S.Ct. at 2373) (internal citation omitted).

The claims of unlawful arrest (without probable cause) and malicious prosecution filed by Lakesha and Georgia, if granted, would contravene the convictions, which have not been reversed,

expunged, or invalidated. A technically lawful arrest can be accomplished by the use of excessive force. See Courtney v. Reeves, 635 F.2d 326 (5th Cir. 1981); Hernandez v. Spencer, 780 F.2d 504, 505 (5th Cir. 1986). Claims of excessive force, if found legitimate, do not challenge the convictions and are not barred by Heck v. Humphrey. Accordingly, the claims of Lakesha and Georgia for unlawful arrest and malicious prosecution are dismissed with prejudice. See Boyd v. Biggers, 31 F.3d at 285; Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995) (§ 1983 false arrest and malicious prosecution challenge conviction, thus barred).

II. Qualified Immunity

Law enforcement officers are protected from personal monetary liability so long as their actions do not violate "clearly established [federal] statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Anderson v. Creighton, 483 U.S. 635 (1987). This standard turns on the "objective legal reasonable-ness" of the official' conduct. Id. The objective reasonableness standard thus "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

> The Supreme Court recently "clarif[ied] the analytical structure under which a claim of qualified immunity should be addressed". We must first determine whether the plaintiff has "allege[d] the violation of a clearly established constitutional right." If he has, we then decide whether the defendant's conduct was objectively reasonable, because "[e]ven if an official's conduct violates a constitutional right, he is entitled to qualified immunity if the conduct was objectively reasonable".

Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993) (internal citations omitted).

A. Excessive Force

The court applies the excessive force test which was applicable on July 4, 1992, for the qualified immunity analysis, while for summary judgment purposes the court must apply the most recent law which also would control the relevant jury instruction. Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989), stated the following test for excessive use of force for alleged Fourth Amendment violations:

> (1) an significant injury, which
> (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was
> (3) objectively unreasonable.

Id. at 480. The Fifth Circuit in Harper v. Harris County, 21 F.3d 597, 600 (5th Cir. 1994), held that the significant injury prong of the Morel test was no longer applicable in light of Hudson v. McMillian, 503 U.S. 1 (1992). Hudson, decided February 25, 1992, was an Eighth Amendment excessive force claim. Although certainly analogous to an Eighth Amendment situation, it was not until Harper v. Harris County (the pertinent Part III was decided on rehearing on May 11, 1994), that "significant injury" element was clearly removed as a requirement in a Fourth Amendment excessive force claim. Insofar as a qualified immunity analogy, arguably the significant injury element is applicable to the incident sub judice which occurred on July 4, 1992. Put another way, the constitutional right to be free from excessive force in a Fourth Amendment

situation to the extent of not having to prove a significant injury was not clearly established at the time of this incident.

The court cannot discern whether Lakesha has stated a claim of excessive force against Officer Mitchell. First, there is no proof that she suffered an injury. Second, although Officer Mitchell certainly attempted to effectuate an arrest of Lakesha, all of the proof submitted indicates that he did not take Lakesha into custody. Attempted use of excessive force has not been recognized as a constitutional claim, and if being exerted, Officer Mitchell would certainly be entitled to qualified immunity.

As to Georgia, the only proof of injury was the fact that Officer Mitchell shocked her with a stun-gun. She has not alleged any injury beyond the initial electrical shock. The court questions whether that alone is more than a de minimus injury. See Jackson v. Culbertson, 984 F.2d 699, 670 (5th Cir. 1993). Brenda alleges that she suffered a strained neck, back, and leg which required taking aspirin. Since none of the plaintiffs have set forth a significant injury, qualified immunity would bar all of their excessive force claims.

Alternatively, the court will assume, for the purpose of this motion, that both Georgia and Brenda have established the first and second prongs of an excessive force claim. Thus, the only question is whether Mitchell's use of force was "objectively reasonable in light of the facts and circumstances confronting [him], without regard to his underlying intent or motivation." Graham v. Connor, 490 U.S. 386, 397 (1989). "In answering this question, we look at

the totality of the circumstances, paying particular attention to 'whether the suspect pose[d] an immediate threat to the safety of the officers or others and whether he [was] actively resisting arrest.'" Stroik v. Ponseti, 35 F.3d 155, 158 (5th Cir. 1994) (quoting Graham, 490 U.S. at 397). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-397. The Fifth Circuit quoted with approval the following language from Smith v. Freland, 954 F.2d 343 (6th Cir. 1992):

> ... we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

Id. 954 F.2d at 347; see also Fontenot v. Cormier, 56 F.3d 669, 673 (5th Cir. 1995) ("The inquiry is conducted without regard for the law enforcement officer's actual state of mind or subjective motivations"). Although the incident which precipitated the pursuit and attempted arrest of the Lakesha was minor, especially considering that it was the Fourth of July, the court refuses to substitute its hindsight enhanced judgment for that of Officer Mitchell's. Officer Mitchell was attempting to effectuate an arrest for which he had sufficient probable cause to pursue. Georgia and Brenda thwarted his efforts even after being told by

Officer Mitchell to step aside. Our system of justice has built into it a means of dealing with unlawful arrests. It is both dangerous and impermissible in an orderly society for citizens to single-handedly determine that an arrest which a police officer is attempting to conduct is somehow unlawful, and thus, justifies their intervention. In the instant case, plaintiffs have failed in their burden "to come forward with summary judgment evidence sufficient to create a genuine issue as to whether the defendant's conduct was objectively unreasonable in light of clearly established law." Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990); see also Gassner v. City of Garland, 864 F.2d 394 (5th Cir. 1989). The plaintiffs argue that Officer Mitchell should have walked away and served a warrant upon them at another time. This argument relies solely upon hindsight and is legally irrelevant. Officer Mitchell had probable cause and used a minimum of force. Taking the evidence in the light most favorable to the plaintiffs, the court finds that Officer Mitchell's actions were not objectively unreasonable.

B. Brenda's Claim of False Arrest and False Imprisonment

Since Brenda was never charged with or convicted of obstruction of justice, Heck v. Humphrey does not bar her claim under § 1983. In California v. Hodari, 499 U.S. 621 (1991), the United States Supreme Court confirmed that a seizure occurs for Fourth Amendment purposes when, by physical force (however slight) or a show of authority, a law enforcement officer restrains the liberty of a citizen in some way. It will be assumed that when

Brenda was taken to the police station, even though she was not handcuffed and was detained only approximately 30 minutes, a seizure occurred. "There is no cause of action for false arrest under § 1983 unless the arresting officer lacked probable cause." Brown v. Bryan County, 53 F.3d 1410 (5th Cir. 1995) (citing Fields v. City of South Houston, 992 F.2d 1183, 1189 (5th Cir. 1991)). "However, the Fourth Amendment requires that we examine not only whether probable cause existed, but also the reasonableness of the manner in which such a seizure is conducted." King v. Chide, 974 F.2d 653, at 657 (5th Cir. 1992) (citing Tennessee v. Garner, 471 U.S. 1 (1985). "Probable cause exists when the facts available at the time of the arrest would support a reasonable person's belief that an offense has been, or is being, committed and that the individual arrested is the guilty party." Blackwell, 34 F.3d at 303 (citing United States v. Raborn, 872 F.2d 589, 593 (5th Cir. 1989)).

> Whether officers have probable cause depends on whether, at the time of the arrest, the "fact and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the arrested] had committed or was committing an offense." Furthermore, although flight alone will not provide probable cause that a crime is being committed, in appropriate circumstances it may supply the "key ingredient justifying the decision of a law enforcement officer to take action."

Brown v. Bryan County, 53 F.3d at 1416 (internal citations omitted).

The facts clearly indicate that Officer Mitchell had probable cause to take Lakesha into custody for disturbing the peace. When

she fled, he had probable cause to arrest her for resisting arrest. Brenda does not deny that she obstructed Officer Mitchell's attempt to arrest Lakesha. She argues that she was justified because his attempted arrest of Lakesha lacked probable cause. She is mistaken. Her actions accordingly gave Officer Mitchell probable cause to arrest her for obstruction of justice. Alternatively, Officer Mitchell's insistence that Brenda be taken into custody for obstruction of justice was objectively reasonable. The court notes that at that point in the episode at least two other police officers were also on the scene. They were the authority who actually took the plaintiffs into custody. Officer Mitchell's act of having Brenda taken into custody and transported to the police station is protected by qualified immunity.

III. State-Law Claims

Federal court jurisdiction over supplemental state claims is governed by 28 U.S.C. § 1367, which provides that:

> in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United State Constitution.

28 U.S.C. § 1367(a) (Supp. 1992).

Pursuant to § 1367(c)(3), the district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the district court has dismissed all claims over which it has original jurisdiction. See Rhyne v. Henderson County, 973 F.2d 386, 395 (5th Cir. 1992). Since this court has dismissed all of

the federal questions which gave it original jurisdiction, the state law claims pending before this court will be dismissed without prejudice, and such claims may proceed in the usual manner pursuant to state court practice and procedure. In so doing, the court expresses no opinion on the state law claims.

An order in accordance with this memorandum opinion shall be issued.

This the _____ day of August, 1995.

_____
CHIEF JUDGE